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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 372

TIMES FILM CORPORATION,

Petitioner,

v.

CITY OF CHICAGO, RICHARD J. DALEY and TIMOTHY J. O'CONNOR,

Respondents.

REPLY BRIEF

FELIX J. BILGREY
144 West 57th Street
New York 19, New York

ABNER J. MIKVA
231 South LaSalle Street
Chicago 4, Illinois

Counsel for Petitioner

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REPLY BRIEF

This Reply brief will serve to clarify certain points raised by Respondents in their Brief in Opposition.

I

The constitutional issue is properly before this Court.

Respondents err in contending that the constitutional issue is waived because the issuance of a permit was requested.

There is no inconsistency in Petitioner's position as it has not at any time attacked the section of the ordinance pertaining to fees. The sole constitutional issue raised is whether the *censorship* scheme is valid, and, far from seeking any "benefits" under this scheme, Petitioner urges this Court to strip the

ordinance of its censorship provisions, directing the issuance of a license pursuant to provisions of the ordinance not in dispute.

We find a comparable procedure in the *Burstyn* case, where this Court's ruling in effect restored a license which had been revoked, after issuance.

II

The motion picture is not obscene.

Petitioner has repeatedly stressed the artistic merits of "The Game of Love", contrary to what Respondents now would have this Court believe.

As part of the unrefuted evidence introduced by Petitioner is illuminating evidence by Petitioner's witness Shelton (R. pp. 18-36); document showing the film won an award at Edinburgh Film Festival in 1954 (Exhibit 1); document showing the film won Grand Prix du Cinema Francais 1954 (Exhibit 2); reviews from leading American newspapers including New York and Boston. (EXH. 16-30)

A print of the film is also part of the Record.

Respectfully submitted,

FELIX J. BILGREY
144 West 57th Street
New York 19, New York

ABNER J. MIKVA
231 South LaSalle Street
Chicago 4, Illinois

Counsel for Petitioner

Brief for the Respondents in Opposition

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

JOHN C. MELANIPHY,
Corporation Counsel of the City of Chicago,
511 City Hall, Chicago 2, Illinois,
Attorney for Respondents.

SYDNEY R. DREBIN,
Assistant Corporation Counsel,

ROBERT J. COLLINS,
Special Assistant Corporation Counsel,
Of Counsel.

THE DONNELLEY-GARDNER PRINTING COMPANY, CHICAGO

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MAY IT PLEASE THE COURT:

The respondents, City of Chicago, Richard J. Daley and Timothy J. O'Connor, oppose the petition for certiorari on the following grounds:

ARGUMENT.

I.

No Constitutional Issue Is Involved.

This Court will not accept a case unless a clear-cut constitutional issue is presented. If the petitioner has waived constitutional matters or is estopped from asserting them, this Court will reject a petition for certiorari.

Petitioner here seeks benefits under an ordinance of the City of Chicago, and, at the same time, attacks the validity of the ordinance on constitutional grounds. This irreconcilable position cannot lead to a clear-cut constitutional issue.

In its complaint, petitioner seeks the following relief (R. 6):

> "That the court issue an order • • • commanding defendants to forthwith issue to plaintiff *the permit required by the aforesaid municipal ordinance.*" (Emphasis added.)

If this Court should grant petitioner the relief it asks, a permit required by the ordinance would be ordered. The effect of such an order would be to sustain the ordinance. In such event, the court could not hold the ordinance to be unconstitutional. The inconsistent position taken by petitioner negatives the necessary constitutional issues which must be present before this Court will accept the case. Petitioner's ultimate goal, the issuance of "the permit required by the ordinance," effectively estops petitioner from attacking the validity of the ordinance upon which it relies and from which it seeks benefits. The rule is that one who invokes the provision of a law, in proceedings or otherwise, may be denied the right to question

its constitutionality. Thus, one who brings a suit under a statute thereby concedes its validity (11 Am. Jur. (1937) Const. Law. Sec. 123, pp. 768, 769). Petitioner here, not only brings suit under the ordinance, but the relief it seeks is the issuance of the permit "required by the ordinance."

Petitioner applied for a permit under the ordinance (Pet. for certiorari, p. 3). Upon refusal of the permit because the movie was found to be obsence, petitioner pursued its administrative remedies and appealed the decision to the Mayor who affirmed the action of the Police Commissioner in refusing a permit because of obscenity (Petition for certiorari, pp. 3, 4). By its complaint, petitioner still seeks "the permit required by the * * * ordinance" (R. 6).

Where one seeks to compel the issuance of a license under a licensing ordinance, he concedes the validity of the ordinance and no question of its validity is presented (62 C. J. S., Municipal Corporations (1949), Sec. 433b, p. 831). True if the application for license is denied, an attack on the licensing ordinance may be made, but the relief petitioner seeks here is to compel the issuance of the permit required by the ordinance. This effectively estops petitioner from challenging the validity of the ordinance.

In *State* v. *Building Commisison of Trumbull* (1948), 135 Conn. 415, 65 A. 2d 165, an application for a building permit was denied and an appeal taken to the zoning board of appeals which affirmed the denial of the permit. Mandamus was then brought to "compel the issuance of the permit". One of the contentions was that the ordinance was unconstitutional. The court rejected such contention and held that, *inasmuch as plaintiff there was seeking a permit*, he was in no position to challenge the validity of the ordinance. This is precisely the situation in the case at bar. Petitioner here is seeking the "permit required by the ordinance." Petitioner cannot, at the same time,

question the constitutionality of the ordinance requiring the permit.

In *Allen* v. *Zoning Board of Review*, (1949), 75 R. I. 321, 66 A. 2d 369, application was made for a variance from a zoning ordinance which application was denied. Certiorari was brought to review the decision of the board denying the variance. It was contended that the ordinance violated the State and Federal Constitutions. The court in holding the constitutional question was not properly before the court for decision, said (66 A. 2d 369, 370):

> "Furthermore, the constitutional question raised by the petitioner is not properly before us in this case. When a zoning board are asked to exercise their discretion under an application for an exception or variation to a zoning ordinance the applicant precludes himself from raising any question as to the constitutionality either of the enabling act or of the ordinance, because by filing such an application he necessarily admits the constitutionality of the laws upon which he relies."

The facts in the foregoing cases are analogous with those in the case at bar. Here, an application for a permit was made and, in the exercise of their discretion, both the Police Commissioner and the Mayor rejected the permit sought. Petitioner, by this suit, still seeks the "permit required by the ordinance." Petitioner is, therefore, "precluded" from raising constitutional issues and "necessarily admits the constitutionality of the laws upon which he relies." The Petition for a Writ of Certiorari should be denied for failure to present a clear-cut constitutional issue.

II.

The Decision of the Court Below Is Not in Conflict With the Applicable Decisions of This Court.

Petitioner contends that the court below has decided a federal question in a manner conflicting with the applicable decisions of this Court (Petition for Certiorari, pp. 5-7). In support of this contention, petitioner argues that the decision of the court below conflicts with the holdings of this Court in *Burstyn* v. *Wilson*, 343 U. S. 495 (1952) and *Holmby Productions, Inc.* v. *Vaughn*, 350 U. S. 870 (1955). We respectfully submit that there is no conflict between these decisions and the decision of the court below in the case at bar.

The *Burstyn* case dealt with a statute of the State of New York which this Court struck down as being "vague and indefinite." The New York authorities had rejected a motion picture on the ground that it was "sacrilegious." This Court expressly stated that its decision was limited to this single issue, saying (p. 505):

> "Since the term 'sacrilegious' is the sole standard under attack here, *it is not necessary for us to decide, for example, whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films. That is a very different question from the one now before us.*" (Emphasis added.)

In the case at bar we are dealing with "a clearly drawn statute designed and applied to prevent the showing of obscene films." Therefore, there is no basis for petitioner's reasoning that the decision of the court below is in conflict with this Court's decision in the *Burstyn* case. There is no similarity whatsoever. In the *Burstyn* case, this Court limited its decision to the "sacrilegious" standard in the New York statute. However, it impliedly held that "a

state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films." The censorship ordinance here under attack has been held to be "clearly drawn" and "designed and applied to prevent the showing of obscene films" (*American Civil Liberties Union* v. *Chicago*, 3 Ill. 2d 334). The Illinois Supreme Court definition of obscenity and its decision in the *American Civil Liberties Union* case has received the approval of this Court (*Roth* v. *United States*, 354 U. S. 476, 489 footnote 26).

Nor is the decision of the court below in conflict with this Court's decision in the *Holmby* case. The *Holmby* case involved a *per curiam* decision where this Court held invalid a Kansas statute "on the authority of the *Burstyn* case." We have shown that the *Burstyn* case is not material to the issues in the case at bar. How, then can the *Holmby* case be pertinent? Both obviously dealt with statutory enactments defective because of vagueness or indefiniteness. Neither is controlling here where we are concerned with "a clearly drawn statute designed and applied to prevent the showing of obscene films." Because the *Holmby* case was a *per curiam* opinion, we do not know what issues were there presented to this Court. We do know, however, from the decision of the State Court, that the Kansas statute involved in the *Holmby* case employed a double standard. The first requirement was that the board was to "approve" films "which were moral and proper." This requirement is not present in the case at bar where it is the "duty" of the Police Commissioner to issue a permit for all movies unless he finds them to be "obscene" (R. 9; Petition for Certiorari, p. 64a). A standard requiring "approval" of films which are "moral and proper" is patently vague and indefinite. No such standard is involved in the case at bar.

Petitioner relies upon *Kingsley Books, Inc.* v. *Brown*, 354

U. S. 436 (Petition for certiorari, p. 6) as being determinative of its contention that this Court has held censorship of motion pictures to be unconstitutional *per se*. On the contrary, the *Kingsley* case supports our position and sustains the right of prior censorship. In the *Kingsley* case the provisions of the New York criminal statute dealing with pornography were amended to permit limited injunctive relief. The courts were empowered by the amendment to issue an injunction *pendente lite* restraining distribution of obscene material. It was contended (p. 440) that resort to this injunctive remedy was "beyond the constitutional power of New York in that it amounts to a prior censorship of literary product and as such is violative of that 'freedom of thought, and speech' which has been 'withdrawn by the Fourteenth Amendment from encroachment by the states.'" It was further contended that New York was limited to its criminal processes in seeking to protect its citizens. As to the latter contention, the court said (p. 441):

> "It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a *qui tam* action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice."

In the *Kingsley* case the petitioner placed strong reliance on the case of *Near* v. *Minnesota*, 283 U. S. 697. This Court pointed out the "glaring" difference between *Near* v. *Minnesota* and the *Kingsley* case by showing that the *Near* case did not involve obscenity, and that the statute therein involved empowered the courts to enjoin dissemination of future issues because its past issues had been found offensive. Legislation of this nature is so obviously bad as to need no further comment. It would be tanta-

mount to the Commissioner of Police in the case at bar denying petitioner a permit to exhibit a motion picture the Commissioner had never seen merely because a prior film of the petitioner's had been found obscene *(Kingsley Books, Inc., v. Brown*, 354 U. S. 436, 445). In other words, the basis of the refusal would hinge on the individual applying and not on the subject matter of the film sought to be exhibited. Petitioner in the case at bar also has relied upon and misapplied the *Near* case (Petition for certiorari, p. 6).

Contrary to the assertion of petitioner (Petition for certiorari, p. 7) the right of prior censorship has received the endorsement of this Court in *Kingsley Books, Inc.*, v. *Brown*, 354 U. S. 436, and the right to prohibit obscenity has met the approval of this Court in *Roth* v. *United States*, 354 U. S. 476.

III.

The Decision of the Court Below Does Not Involve an Important Question of Federal Law Which Should Be Settled by This Court.

Petitioner argues that the *Burstyn* case stands for the proposition that censorship of motion pictures is unconstitutional *per se* (Petition for certiorari, pp. 7-10). Nothing could be further removed from the truth. This Court did not so hold in the *Burstyn* case. No court has ever so held.

In the *Burstyn* case this court held that the United States Constitution does not require absolute freedom to exhibit every motion picture of every kind at all times and all places (343 U. S. 495, at page 502). This statement was quoted with approval by the court below [*Times Film Corporation* v. *City of Chicago* (1957), 244 F. 2d 432, p. 434].

As we have heretofore shown, this Court in the *Burstyn* case explicitly noted that a clearly drawn statute designed

and applied to prevent the showing of obscene films was not involved. Despite this reservation, petitioner would have the *Burstyn* case applied throughout the land as being determinative of the fact that censorship of motion pictures is invalid, no matter what facts are involved and without regard to the language of the statute invoked.

The Supreme Court of Illinois has repeatedly sustained the validity of the Chicago ordinance providing for censorship of films (*Block* v. *City of Chicago*, 239 Ill. 251; *United Artists Corp.* v. *Thompson*, 339 Ill. 595; *American Civil Liberties Union* v. *City of Chicago*, 3 Ill. 2d 334). Petitioner contends that there is some confusion as to the status of the law because the Master in the case at bar found the ordinance to be unconstitutional, and that the motion picture was not obscene. This would mean confusion every time a Master in Chancery was overruled. From a factual standpoint, the film was found to be obscene by the Police Commissioner, the Board of Censors, the Mayor of the City of Chicago, eleven out of twelve jurors, the District Court and the Circuit Court of Appeals. This unanimity of opinion as to the obscenity of the movie does not lend itself to "confusion".

Petitioner argues that "the cardinal principle" of the *Burstyn* case has eroded into comparison of statutory enactments with those involved in the New York statute in that case. Petitioner does not state what the "cardinal principle" is, but we conceive it to be that a statute which is vague or indefinite will be held invalid. This Court specifically invited comparison of statutory language when it pointed out that its decision was limited to the word "sacrilegious" and that obscenity was not involved. Of course, every statute is phrased differently. And every case is factually different. This Court cannot hold with petitioner's argument that the *Burstyn* case was intended to meet any set of facts and every statute or ordinance. The

absurdity of his reasoning is apparent. Each set of facts and each statute must be met on its own grounds.

Petitioner argues (Petition for certiorari, p. 10) that the issue of obscenity has been settled by this Court in *Roth* v. *United States*, 354 U. S. 476 (referred to in its petition as *Alberts* v. *California*). We agree. In the *Roth* case this Court said (p. 481):

> "The dispositive question is whether obscenity is utterance within the area of protected speech and press. *Although this is the first time the question has been squarely presented to this Court, either under the First or * * * Fourteenth Amendment, expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press.*" (Emphasis added.)

and held (p. 485):

> "We hold that obscenity is not within the area of constitutionally protected speech or press."

This Court having crystalized the law of obscenity and prior censorship in the *Roth* and *Kingsley Books, Inc.* cases and the decision of the court below not being in conflict therewith, it is apparent there is no constitutional or substantial federal question presented in the Petition for Writ of Certiorari.

IV.

The Court Below Properly Held the Film Involved to Be Obscene.

Plaintiff contends that the motion picture with which we are concerned is not obscene (Petition for certiorari, pp. 10-11). Plaintiff links its argument here with further attacks on the constitutionality of the ordinance in question. Plaintiff does not sustain its position by any reference to the facts as disclosed in the opinion of the court below. The

court below did hold that "Expression by means of motion pictures is included within the free speech and free press guaranty of the first and fourteenth amendments" (Petition for certiorari, p. 56a; 244 F. 2d 434), but that the "public exhibition of obscene moving pictures may be barred by proceedings under a proper * * * ordinance * * * and that the rights of the exhibitor of such a picture under the first and fourteenth amendments * * * are not thereby violated" (Petition for certiorari, p. 57a; 244 F. 2d 435). The court below proceeded to find that the ordinance with which this court is concerned was not vague, and that its words were precise and constituted a proper test (Petition for certiorari, p. 58a; 244 F. 2d 435). The court below held that "The first and fourteenth amendments * * * do not, and were never intended to, shield public peddlers of obscenity and immorality." (Petition for certiorari, p. 59a; 244 F. 2d 436.)

In discussing the substance of the motion picture, the court below found that, from beginning to end, the thread of the story is supercharged with a current of lewdness generated by a series of illicit sexual intimacies and acts; that in the introductory scenes a 16 year old boy is shown completely nude on a bathing beach in the presence of a group of younger girls; that the boy is seduced by a woman old enough to be his mother; that under this experience, and an arrangement to repeat it, the boy thereupon engages in sexual relations with a girl of his own age; and that the calculated purpose and dominant effect of the producer of the film was substantially to arouse sexual desires (Petition for certiorari p. 60a; 244 F. 2d 436). These positive findings of fact outweigh anything petitioner has to say as to the obscenity of the film. Petitioner, in fact, says almost nothing on the subject contenting itself with vague generalities and unsupported conclusions.

Petitioner launches an attack on the five women censors who recommended that the film be denied a permit and charges that the court below "threw out all of the testimony dealing with the artistic merits" of the motion picture (Petition for certiorari, p. 11). Petitioner gives us no record reference as to the alleged "artistic merits" for the simple reason that there are none. Petitioner employed the same tactics in the court below but met with no success because the record wholly fails to sustain the claimed artistic merits. The record only shows an obscene film. The court below said (Petition for certiorari, p. 61a; 244 F. 2d 436): "We agree with the opinions of the judge of the district court, the police commissioner and the persons whom he caused to inspect the film. All of them viewed the picture. They found it obscene and immoral." The mayor also found the film to be obscene (Plaintiff's Exhibit 11) and so did a jury (R. 290).

Peddlers of obscenity, through the media of motion pictures, pocket books, television and other means, have flooded this nation with their vile products. When called to account, they invariably claim protection under the constitutional guarantees of freedom of speech and freedom of the press. The overwhelming juvenile problem confronting this country today is due, in no small measure, to these factors. This Court has never held that everything can be exhibited or published, any more than it would hold that nothing can be exhibited or published. Every case must be decided upon its own facts. Each poses different problems. This Court is bound by the facts as shown in the opinion of the court below, unless they are manifestly against the weight of the evidence. Petitioners do not argue that the facts in the opinion of the court below are against the weight of the evidence. Inasmuch as the record demonstrates conclusively that we are dealing with an obscene picture appealing to prurient desires, this Court should reject the Petition for Writ of Certiorari.

Conclusion.

We have demonstrated that there is no constitutional or substantial federal question presented in the case at bar. We have shown that the decision of the court below is not in conflict with the applicable decisions of this Court and that the decision of the court below is in conformity with the most recent pronouncements of this Court.

We have proven from the facts stated in the opinion of the court below that the motion picture in issue is obscene, and that it should not be inflicted upon the people.

Wherefore, respondents pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JOHN C. MELANIPHY,
Corporation Counsel of the City of Chicago,
511 City Hall, Chicago 2, Illinois,
Attorney for Respondents.

SYDNEY R. DREBIN,
Assistant Corporation Counsel.

ROBERT J. COLLINS,
Special Assistant Corporation Counsel.
Of Counsel.